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8

9 *Attorneys for Defendants/Third-Party Plaintiffs K. Hovnanian*  
10 *at Gallery, LLC and K. Hovnanian Arizona Operations, LLC*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 GALLERY COMMUNITY ASSOCIATION, an  
Arizona non-profit corporation,  
14  
Plaintiff,

15 v.

16 K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
17 HOVNANIAN ARIZONA OPERATIONS, LLC,  
an Arizona limited liability company; K.  
18 HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.  
19 HOVNANIAN COMPANIES OF ARIZONA,  
LLC, an Arizona limited liability company; JOHN  
20 DOES I-X AND JANE DOES I-X, WHITE  
21 CORPORATIONS I-X; BLACK  
PARTNERSHIPS I-X; AND GRAY LIMITED  
22 LIABILITY COMPANIES I-X,

23 Defendants.

24 K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
25 HOVNANIAN ARIZONA OPERATIONS, LLC,  
an Arizona limited liability company; K.  
26 HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.  
27 HOVNANIAN COMPANIES OF ARIZONA,  
LLC, an Arizona limited liability company;  
28

Case No. CV2020-008714

**DEFENDANTS/THIRD-PARTY  
PLAINTIFFS' RESPONSE TO  
THIRD-PARTY DEFENDANTS  
DESERT VISTA, INC. AND RENCO  
LLC DBA RENCO ROOFING'S  
JOINT MOTION FOR SUMMARY  
JUDGMENT**

(Assigned to the Honorable Katherine  
Cooper)

1 Third-Party Plaintiffs,

2 v.

3 CHAS ROBERTS AIR CONDITIONING, INC.,  
4 an Arizona corporation; DESERT VISTA, INC.,  
5 an Arizona corporation; GOTHIC  
6 LANDSCAPING, INC., a California corporation;  
7 HOME BUILDERS SITE SERVICES OF  
8 ARIZONA, LLC, an Arizona limited liability  
9 company; LEBLANC BUILDING CO., INC., an  
10 Arizona corporation; LIBERTY  
11 CONSTRUCTORS, LLC, an Arizona limited  
12 liability company, dba LIBERTY ARIZONA;  
13 RENCO LLC, an Arizona limited liability  
14 company, dba RENCO ROOFING; R/S SERVICE  
15 & SUPPLY, INC., an Arizona corporation;  
16 SARGON MASONRY CONSTRUCTION, LLC,  
17 an Arizona limited liability company; and DOES  
18 1-50.

19 Third-Party Defendants,

20 COME NOW Defendants/Third-Party Plaintiffs' K. Hovnanian at Gallery, LLC and K.  
21 Hovnanian Arizona Operations, LLC ("Hovnanian"), by and through undersigned counsel, and  
22 hereby submit their Response to Third-Party Defendants Desert Vista, Inc. ("Desert Vista") and  
23 Renco LLC dba Renco Roofing's ("Renco") Joint Motion for Summary Judgment. The Motion  
24 should be denied because there is ample evidence from Plaintiff's experts, Hovnanian's experts,  
25 Movants' experts, and fact witnesses to support potential liability on Hovnanian's derivative  
26 claims against the Movants. Simply put, the Plaintiff alleges that the stucco and the roofs are  
27 defective. Hovnanian did not construct the stucco or roofs. Instead, it paid Desert Vista and Renco  
28 hundreds of thousands of dollars to do so. Hovnanian is only alleging that Desert Vista and Renco  
be responsible for their own work. If their work is defective, and there is evidence to suggest it  
may be, then Desert Vista and Renco are responsible. Hovnanian's Response is supported by the  
following Memorandum of Points and Authorities, and the Controverting Statement of Facts  
("CSOF") and Separate Statement of Facts ("SOF") submitted herewith.

29 **MEMORANDUM OF POINTS AND AUTHORITIES**

30 Movants Desert Vista and Renco have argued that the evidence is not sufficient to establish  
31 that their work is defective or that they fell below the standard of care. Movants ignored the fact

1 that the claims at issue are Third-Party claims for indemnity, defense, and other derivative  
2 liability. The claims arise from allegations by Plaintiff Gallery Community Association  
3 (“Plaintiff”) against Hovnanian. Plaintiff alleges that the construction of the residential property  
4 at issue was defective and performed inconsistently with applicable standards of care. Plaintiff  
5 has produced opinion evidence from its experts regarding specific components of the property  
6 they claim were constructed defectively, below the standard of care, and which have caused  
7 damages including costs of repair. That work includes the stucco and roofing work performed by  
8 Movants. Hovnanian’s experts have generally disagreed with Plaintiff’s opinions. Hovnanian’s  
9 experts opined that most items, but not all, were performed consistently with the standard of care.  
10 There are, however, certain items that Plaintiff, Hovnanian, and Movant Desert Vista’s experts all  
11 agree fell below the standard and require repair. There is evidence that can establish the standards  
12 of care for each of the conditions claimed by Plaintiff and its expert, and breach of those standards.  
13 Simply stated, the evidence is mostly disputed, but can support liability claims against  
14 Defendants—and therefore Movants—if the jury agrees with Plaintiff’s expert. The evidence  
15 further shows which of these conditions were constructed by each of the Movants and were within  
16 the scope of their contractual obligations. The evidence includes the contracts, fact witness  
17 testimony, as well as testimony by Movants’ experts.

18 Hovnanian’s experts do not agree that the construction fell below the standards of care as  
19 claimed by Plaintiff’s expert. There is conflicting evidence over whether the work by Desert Vista  
20 and Renco met the applicable standards. This is simply not the same as the lack of evidence as  
21 argued by Movants.

22 Movants cite to *Woodward v. Chirco Constr. Co., Inc.*, 141 Ariz. 520, 521-2 (App. 1984)  
23 for the proposition that “standards prescribed by law and prevailing in the industry” are outside  
24 the knowledge of the average lay person. Movants conveniently ignore the Plaintiff and its expert.  
25 The evidence does and must include opinions by Plaintiff’s construction expert as to the standards  
26 of care to be followed and how failure was a breach. If Plaintiff’s expert is permitted to testify  
27 against Hovnanian he will provide opinions on the applicable legal standards. Defendants’ expert  
28 Terry Ingo and experts or Movants have also provided opinions in their reports and testimony

1 regarding the applicable standards of care and whether they were breached. Standards of care may  
2 be a complicated issue requiring expert explanation, and the record does include expert opinion  
3 evidence on that topic. As far as who actually performed the work that breached the work at issue,  
4 this is a factual issue which is not in dispute.

5 Movants discuss at length the motion practice and rulings on exclusion of Hovnanian's  
6 expert opinions submitted after the July and August 2021 liability and damages deadlines.  
7 However, this evidence is not at issue in the Response. The evidence in the case can support a  
8 finding of liability for each of the Movants. Discussion of evidence not in the case is unhelpful.  
9 Speculation by Movants about the purpose or 'need' for the excluded reports or regarding 'flaws'  
10 in the report is neither accurate nor relevant to the question before the Court. Hovnanian has  
11 addressed material misstatements in their Controverting Statement of Facts and will not comment  
12 further. Most of this is simply beside the point. If the Plaintiff HOA's expert testifies that the  
13 stucco work and the roofing work fell below the standard of care, that work was performed by  
14 and is ultimately the responsibility of Desert Vista and Renco.

15 **I. Evidence Can Show That Desert Vista Failed to Meet Its Standard of Care for Work**  
16 **it Agreed to Perform and did Perform**

17 Plaintiff has identified Ed Fronapfel of SBSA as its expert for its liability claims. Mr.  
18 Fronapfel identified opinions in his report concerning components of the Gallery Association  
19 property that he believes are defective and require repair. For each of those he identifies the  
20 particular standards of care for construction for those items.

21 He identified many items in the stucco system which he claimed to be defective and  
22 installed inconsistently with the applicable standard of care. He recommended removal and  
23 replacement of the stucco system in order to address certain of these issues. (SOF 1.) All parts of  
24 the repair cost opinions set forth by Plaintiff's expert Stefen Gustafson of Nautilus are based on  
25 the repair recommendations by Mr. Fronapfel. (SOF 2). Repair costs for the stucco system alone  
26 amount to over two million dollars. (SOF 3).

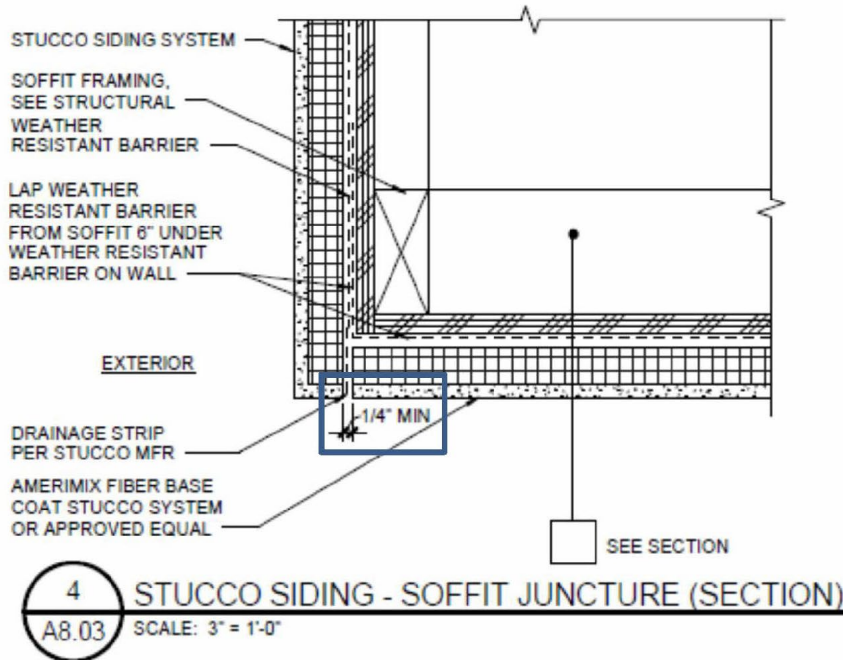
1 C.1.0.a. Missing Weep Mechanism in Stucco

2 For example, in his report Mr. Fronapfel addressed the stucco system generally and the  
3 applicable code standards, industry standards, and project-specific standards including standards  
4 set forth in Defendants' project specifications, design documents, and manufacturer's instructions  
5 for the materials used. These are set forth in his discussion of category C. Building Envelope 1.0  
6 Façade (Exterior Cladding and Sealants) Type 1 – Stucco. (SOF 4.)

7 Mr. Fronapfel went on to identify his opinions regarding missing weeps in the stucco  
8 system as item "C.1.0.a. Missing Weep Mechanism in Stucco." (*Id.*) He identified applicable  
9 standards which he says require installation of weep screeds in the stucco above fenestration heads  
10 (i.e. above windows and doors), and at junctions where the stucco terminates at soffits. (*Id.*) He  
11 included a detail from the project designs to illustrate the proper installation of weeps at the soffit  
12 Juncture. (*Id.*) See the detail from plans at p. 68 / GALLERY-SBSA\_005019.)

13 Otak, Inc., "K. Hovnanian Homes, Gallery Townhomes," revised date August 2, 2016,  
14 Sheet A8.03 "Exterior Details," illustrates the following:

- 15 • "4/A8.03 Stucco Siding - Soffit Juncture (Section)"



1 Defendant's expert Terry Ingo of BHA and Desert Vista's expert West Harrington of HCCI  
2 disagree with Plaintiff's expert as to whether appropriate standards require installation of weep  
3 screeds above fenestration heads at Gallery. (SOF 8.) Desert Vista's expert West Harrington  
4 testified that he disagreed with Plaintiff's expert that weeps above windows were required or were  
5 standard of practice. (SOF 9.) There is no question that weeps were not installed above  
6 fenestration, the only question is which expert is correct about the applicable standard.

7 All experts including Defendant's expert and Desert Vista's agree that weeps should have  
8 been installed in the stucco at soffit junctures. All experts agree that the missing weep condition  
9 exists in those locations. All experts agree that the condition requires repair. (SOF 10.)

10 As part of SBSA's destructive testing protocol, stucco was removed at several wall-to-soffit  
11 transitions. Hovnanian's expert observed some locations with clear evidence the lack of a weep  
12 mechanism at the soffit has allowed moisture to accumulate behind the stucco system and  
13 deteriorate the water resistive barrier. While not every wall-to-soffit transition exhibited signs of  
14 water damage, Hovnanian's expert concluded the condition is problematic and should be repaired.  
15 Hovnanian's expert's opinion and testimony is that at large wall-to-soffit locations, remove a 12-  
16 inch strip of stucco from the wall and soffit and install weeps integrated with water resistive barrier  
17 before restoring the stucco system. The repairs should be painted to match the adjacent finishes.  
18 (SOF 10.)

19 It is Desert Vista's expert's opinion that there is only minimal evidence of water intrusion  
20 at the wall to soffit intersections. However, the absence of a weep mechanism may result in  
21 damage over the life of the building. Accordingly, even Desert Vista's own expert recommends  
22 the installation of a weep mechanism at the large wall to soffit locations. Desert Vista's own expert  
23 has independently evaluated the developer expert's scope and cost of \$59,579.47 associated with  
24 this issue and has determined that it is an appropriate scope and cost to repair for this issue. (SOF  
25 10.)

26 2. C.1.O.b. Non-complaint Water Resistive Barrier for stucco system.

27 Plaintiff's expert provided opinions regarding the Weather Resistive Barrier in his section  
28 in C.1.O.b. "Non-complaint WRB for stucco system." (SOF 11.) He identified the standards he

1 believes are applicable regarding the WRB material to be used and where one or two layers of  
2 WRB were required. (SOF 12.)

3 Hovnanian’s expert notes limited areas where the WRB installation had a technical  
4 deficiency. He disagreed that a “technical deficiency at a few locations is a defect that requires  
5 the removal and replacement of the entire stucco system at every building.” (SOF 13.) Desert  
6 Vista’s expert also observed limited conditions which he acknowledged there were areas where  
7 the WRB did not comply with applicable standards he did not believe there was evidence the  
8 system was not performing as intended. “During SBSA’s destructive testing, stucco was removed  
9 at a number of locations and the WRB was inspected. At some locations, there was a single layer  
10 of WRB over OSB shear panel. While HCCI [Movant’s expert] agrees that the building code and  
11 ESR-3529 prescribe either two-layers of WRB (or 60-minute Grade D paper separated from the  
12 stucco by an intervening non-water-absorbing layer or drainage space) there is no evidence that  
13 the as-built condition is not performing as intended.” (SOF 14.)

14 Desert Vista’s expert also testified about other opinions on the standard for the WRB. (SOF  
15 15.) It is beyond the pale that Desert Vista argues that there is no evidence of its alleged failure to  
16 comply with industry standards, when its own expert’s opinions could be construed by a jury to  
17 the contrary.

18 3. C.1.0.C Non-compliant EPS foam board for stucco system

19 Plaintiff’s expert Mr. Fronapfel identified opinions regarding his item C.1.0.C “Non-  
20 compliant EPS foam board for stucco system.” (SOF 16.) He takes the position that the EPS foam  
21 board installed as a component of the stucco system does not comply with the manufacturer’s  
22 requirements as set forth in the ICC Evaluation Service Reports. (*Id.*)

23 Hovnanian’s expert does not disagree with the ICC Evaluation Service Reports or that  
24 Desert Vista did not install the foam board correctly in all areas, but instead opined that no damage  
25 was observed from the alleged deficiency. (SOF 17.) Once again, Desert Vista’s own expert, Mr.  
26 Harrington, offered the same opinion in his own report. (SOF 18.) At his deposition, Mr.  
27 Harrington added that he had formed new opinions based on information received from Desert  
28 Vista’s principal. He learned that Desert Vista had understood that it was required to install an

1 EPS foam board with grooves on center, and did in fact order and install that. He testified that  
2 based on the new information he believed the testing by Plaintiff’s expert was not sufficient to  
3 establish that there was a deficiency because it did not expose enough to show the grooves.

4 13 Q. Okay. The information you obtained from Todd at  
5 14 Desert Vista was that Desert Vista did understand that a  
6 15 grooved foam material was needed, did order a material  
7 16 that had grooves at 12-inch on center, and did install  
8 17 that?

9 18 A. Correct.

10 19 Q. Okay.

11 20 A. Well put.

12 (SOF 19.)

13 Each side’s expert testified on standards of care applicable to the work at issue. Desert  
14 Vista’s expert West Harrington of HCCI provided his own opinions on standards of care  
15 applicable to the conditions in the stucco work. (CSOF ¶ 17.) He also provided opinions  
16 specifically as to whether Desert Vista’s work complied with applicable standards. (*Id.*)

17 4. C.1.0.d. Non-compliant slope of horizontal stucco surfaces

18 Plaintiff’s expert also identified standards of care applicable to his defect claim for his issue  
19 C.1.0.d., “Non-compliant slope of horizontal stucco surfaces” including the project plans and  
20 standards from the Stucco Manufacturer’s Association. (SOF 20.) Hovnanian’s expert opined that  
21 the conditions at issue had generally positive slope and disagreed that a technical deficiency in  
22 slope in one location constituted a defect requiring repair. (SOF 21.) Desert Vista’s expert testified  
23 he observed conditions that did not comply with the design but opined that the condition as  
24 performing and not suffering from damage the justified repair. (SOF 22.)

25 5. C.1.0.e “Deficient self-adhered membrane under horizontal stucco system.

26 Plaintiff’s expert also provided standards and argued the standards were breached with  
27 respect to his issue C.1.0.e “Deficient self-adhered membrane under horizontal stucco system.”  
28 (SOF 23,)Experts for Defendant and for Desert Vista disagreed with his contention that a failure  
occurred. (SOF 24.) But, once again, there is evidence that a jury could find that Desert Vista did  
not perform its work correctly.

1           6.       C.1.0.f Missing Control/Movement Joints

2           Plaintiff’s expert identified standards of care for the installation of stucco control joints,  
3 including the project designs, ASTM standards, and Amerimix product instructions and ESR  
4 reports. (SOF 25.) Defense expert Mr. Ingo provided his own opinions regarding the standard and  
5 the need for control joints in a one-coat stucco system and as to his interpretation of the design  
6 intent. (SOF 26). Desert Vista’s expert noted that Mr. Fronapfel has made inconsistent statements  
7 about the interpretation of the design and design intent. He also denies there is sufficient cracking  
8 to justify repair to this issue. “Furthermore, the configuration of these buildings does not result in  
9 any large, uninterrupted planes of stucco and consequently, would not benefit from the addition  
10 of control joints. The cracking that exists is well within industry tolerances. No repairs associated  
11 with Desert Vista are required.” (SOF 27.)As evidenced by this dispute, Desert Vista is once again  
12 incorrect in claiming that there is no evidence that it did not perform its work correctly and that it  
13 fell below the standard of care.

14           7.       C.2.0.a. Missing Sheet Metal Flashing at Window Head

15           Plaintiff’s expert opined regarding issue C.2.0.a. “Missing Sheet Metal Flashing at  
16 Window Head” and said that standards including the plans, and the International Building Code  
17 required metal flashing at window heads supported his claim of defective installation. (SOF 28.)  
18 Hovnanian’s expert, Mr. Ingo, disputed Mr. Fronapfel’s opinion and said the applicable standard  
19 for installation of the vinyl finned windows used in this property was to follow the manufacturer’s  
20 instructions, which did not require metal flashing. (SOF 29.) Desert Vista’s expert, Mr.  
21 Harrington, provided a similar opinion on the standard: “The manner in which Desert Vista  
22 terminated their plaster system at window heads is consistent with the predominant custom and  
23 practice in the Greater Phoenix region. In fact, the windows are specifically manufactured to  
24 receive the stucco system without additional weeping mechanisms...The as-built condition is  
25 consistent with regional practices and is performing as intended. No modification to the window  
26 assemblies associated with Desert Vista’s work is required.” (SOF 30.)

1 8. C.2.0.b “Non-Compliant Flashing to Stucco Interface.”

2 Plaintiff’s expert Mr. Fronapfel provided opinions regarding his issue C.2.0.b. “Non-  
3 Compliant Flashing to Stucco Interface.” He identified applicable standards including the project  
4 plans and Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)  
5 requirements referenced by the architect. (SOF 31.) Defendant’s expert agreed the condition of  
6 metal flashing buried in the stucco was deficient and required repair. (SOF 32). Desert Vista’s  
7 expert, Mr. Harrington, opined that he observed the condition but stated “From a sequencing  
8 standpoint, this flashing would have been installed *after* Desert Vista performed their work. This  
9 condition does not relate in any part to the work of Desert Vista. No repairs associated with Desert  
10 Vista are required.” (SOF 33.)

11 Plaintiff’s expert provided opinions regarding standards applicable to his issue C.2.0.c,  
12 “Non-Compliant Isolation Joints at Dissimilar Materials.” These included the plans, various  
13 codes, American Architectural Manufacturers Association/AAMA and ASTM standards. (SOF  
14 34.) Defendant’s expert disagreed that there was improper isolation joints at some of the areas  
15 claimed but agreed repairs were needed along the tops of certain stairways. (SOF 35.) Mr.  
16 Harrington again opined that the work by Desert Vista complied with applicable standards and  
17 disagreed that the standards required isolation joints at windows as Plaintiff’s expert had opined:

18 “The manner in which Desert Vista terminated their plaster system around windows  
19 and other penetrations is consistent with the predominant custom and practice in the  
20 Greater Phoenix region. In fact, the windows are specifically manufactured such  
21 that they do not require that the stucco system terminate into an isolation joint. The  
as-built condition is consistent with regional practices and is performing as  
intended. No modification to the window assemblies, or other penetrations,  
associated with Desert Vista’s work is required.”

22 (SOF 36.)

23 The record contains evidence regarding the standards of care applicable to each of the  
24 above conditions, and whether the as-built condition applies. Plaintiff’s expert Mr. Fronapfel  
25 opined on the standards for each of his defect claims and has asserted they were breached.  
26 Hovnanian’s expert Mr. Ingo has, for each item, provided his own opinion on the applicable  
27 standard, sometimes agreeing but often disagreeing with Plaintiff’s expert. He has provided his  
28 own opinions on whether he agrees or disagrees with Plaintiff about the existence of the conditions

1 which Plaintiff's expert claims to have observed, and opinions on whether those require a repair.  
2 Desert Vista's expert has provided his own opinions on the standards and whether the work  
3 complied, often agreeing with Hovnanian's expert. As should be abundantly clear, Desert Vista  
4 is simply wrong in its assertion that it should be out of this case due to no evidence of it falling  
5 below the standard of care. There is disputed evidence. And if Plaintiff's expert is believed by the  
6 jury, there is uncontroverted evidence that Desert Vista performed this work.

7 **II. Evidence Shows That Desert Vista Agreed to Construct and Did Construct Each of**  
8 **These Components of the Stucco System Which Plaintiff's Expert Claims to be**  
9 **Defective and in Breach of Standards**

10 The stucco system was installed by Desert Vista, pursuant to its contract.

11 Evidence supporting this comes from the contract, fact witness testimony. It is also  
12 supported by testimony from the experts about what work was actually performed by Desert Vista  
13 as the stucco contractor or plasterer according to its contract and according to custom and practice.

14 Movants produced a Master Subcontractor Agreement and Work Agreement which they  
15 acknowledge provided that Desert Vista would provide labor and materials related to the stucco  
16 at Gallery. (Movant's Statement of Facts, ¶ 4, and Movant's Exhibit 2.) (SOF 37.)

17 Desert Vista's Ariz.R.Civ.P. 30(b)(6) representative designated to testify regarding the  
18 scope of work confirmed that Desert Vista's work included supply and installation of the WRB,  
19 weeps "at the sole plate," supply and installation of the EPS foam board, and installation of control  
20 joint. He testified he lacked knowledge who installed the SAM under horizontal stucco and  
21 whether or not anyone else was responsible for installing weep screeds. (SOF 38.)

22 Desert Vista's expert also confirmed that the items which he had addressed in his report,  
23 were installed by Desert Vista or at least ordinarily installed as part of its scope of work.

24 Desert Vista's expert agreed that weeps were part of Desert Vista's scope of work, that  
25 weeps are part of the plaster system, and are typically installed by the plasterer. (SOF 39.)

26 Desert Vista's expert testified that the EPS board was installed by Desert Vista. (SOF 40.)

27 Desert Vista's expert testified that the WRB was typically installed by the plasterer. (SOF  
28 41.)

1 Mr. Harrington denied knowledge of who installed the self-adhered membrane/SAM  
2 underneath horizontal stucco, and said it would sometimes be a sheet metal subcontractor and  
3 sometimes a plasterer. (SOF 42.)

4 But Desert Vista’s expert testified the control joints are part of the stucco system. He  
5 testified as to lack of specific knowledge as to whether Desert Vista installed the control joints in  
6 the stucco or the accessories needed to create the joint but that typically it was part of the  
7 plasterer’s scope of work to do so. (SOF 42.)

8 **A. Repairs Arising From Stucco Defects**

9 Plaintiff’s expert Mr. Fronapfel identified repairs arising from each of his separate defect  
10 claims conditions. (SOF 43.)

11 Plaintiff’s cost of repair expert Stefen Gustafson testified that he implemented the repairs  
12 as identified by Mr. Fronapfel. (SOF 44.)

13 Repair costs identified by Defendant’s expert Mr. Ingo are, again, tied to each particular  
14 defect claim. Desert Vista’s expert Mr. Harrington provided his own opinions on certain repair  
15 costs including his agreement with certain of Mr. Ingo’s costs. (SOF 45 and 46).

16 The evidence of each defect issue has its own repair cost. The record contains evidence  
17 from which a jury may find the existence or non-existence of each particular defect (except for  
18 issues where all experts agree that defects in Desert Vista’s work from a breach requiring repair)  
19 and from which the jury may determine the cost of the repair (generally either Plaintiff’s figure  
20 for the repair or Defendants’). Thus, Desert Vista’s Motion for Summary Judgment must be  
21 denied.

22 **III. Evidence Can Show That Renco Failed to Meet Its Standard of Care for Work it**  
23 **Agreed to Perform and did Perform**

24 Plaintiff’s expert identified various conditions in the Spray Polyurethane Foam (SPF) flat  
25 roof and in the coating and flashing at walk decks. Mr. Fronapfel identified claims regarding  
26 various causes for the failures and leaks observed at the property.

27 ///

28

1 1. C.3.0.a. Non-Compliant Slope to Roof Drains

2 Plaintiff's expert identified standards of care including IBC code sections for slope of  
3 sprayed polyurethane foam roofs. He claims that non-compliant slopes exist throughout all  
4 locations at all buildings. He further claims that cuts and blisters in the roof membrane surface  
5 contribute to the problems. (SOF 47.) He testified that he saw splits and blisters and evidence of  
6 water migrating through those areas . (SOF 48.) Hovnanian's expert opined that Plaintiff had not  
7 established a defect or failure to drain at the decks. (SOF 49.)

8 Hovnanian's expert Mr. Ingo and Renco's expert Chad Polivka of MC Consultants  
9 disputed that there was a defect. (SOF 50).

10 2. C.3.0.b. Roof Leaks

11 Plaintiff's expert addressed additional leaks at multiple units that occurred after the initial  
12 reports. He opined that "Where roof leaks exist, the as-built condition falls short of the prescriptive  
13 requirements of the relevant codes, design, and industry standards and, therefore, the developer,  
14 contractor, and subcontractors who performed the work fell below the standard of care." (SOF  
15 51.)

16 Mr. Fronapfel testified that there was evidence of ponding from natural precipitation and  
17 reports of interior damage that he determined was a direct result. He also testified that he  
18 performed some water testing in one roof location and did not identify a leak. (SOF 52)

19 3. Subsequent roof leaks

20 Other roof leak incidents have been identified by Plaintiff since the October 2021 reports.  
21 As of Plaintiff's Nineteenth Supplemental Disclosure dated, September 7, 2022, Plaintiff has  
22 claimed the following for "temporary repairs" at multiple roof locations:

23 *Temporary repairs at 3124 \$ 1,482.61 GALLERY 006621-006628*  
24 *Temporary repairs at 3104, 3109, 3112 & 3124 \$16,281.73 GALLERY\_006631-*  
*006640.*

25 (SOF 53.)

26 4. C.4.0.a. Non-Complaint Slope of Deck

27 Plaintiff's expert also identified claims regarding deficiencies in the decks and balconies.  
28 He cited Specifications for the property calling for "Polydeck 355 Decking System die by the

1 Roofing Trade Partner.” He referenced standards including the specifications and project plans.  
2 He claims that non-compliant deck slope at edge flashing exists at seven units. (SOF 54).

3 Hovnanian’s expert opined that Plaintiff had not established a defect or failure to drain at  
4 the decks. (SOF 55.)

5 **IV. Evidence Shows That Renco Agreed to Construct and Did Construct Roofs and Deck**  
6 **Components Which Plaintiff’s Expert Claims to be Defective and in Breach of**  
7 **Standards**

8 Renco states in its Motion and SOF that it entered an agreement to provide labor and  
9 materials “relating to foam roofs and walking decks.” (Renco’s SOF 3 and Exhibit 1, and SOF  
10 56).

11 Renco’s Ariz.R.Civ.P. 30(b)(6) designee Jeffrey Paul Nickerson testified that the scope of  
12 work performed was the flat roof and walk deck:

13 14·Q· ·Okay· In your own words, can you tell me what  
14 15· work was performed by RenCo at the Gallery?  
15 16· ··A· ·We installed a roofing system on the flat roofs  
16 17· and we installed a walk deck pedestrian system on the  
17 18· balcony.

18 (SOF 57.)

19 Mr. Fronapfel calls for repairs to roofs and to decks for the conditions that he described  
20 (SOF 58.)

21 Mr. Gustafson provided costs for the particular defect items. (SOF 59.)

22 Hovnanian anticipates Plaintiff will also seek the costs for the “temporary roof repairs” it  
23 has disclosed.

24 As with Desert Vista and Stucco, there is similar evidence that Renco fell below the  
25 standard of care in constructing the roofs and the decks.

26 **A. Defendants are entitled to Indemnification from Movants Per the Contracts**

27 Movants discussed the general terms of A.R.S. § 31-1159.01(A), Arizona’s “anti-  
28 indemnity statute” applicable to residential construction claims. It is correct that an indemnity  
agreement in residential construction is “void only to the extent that it purports to insure, to  
indemnify or to hold harmless the promisee from or against liability for loss or damage resulting  
from the negligence of the promisee or the promisee’s indemnitees, employees, subcontractors,

1 consultants, or agents other than the promisor.” Movants admit that their agreements require them  
2 to indemnify, hold harmless, and defend Defendants for defects and losses that were “caused by”  
3 their actions or omissions at the project. (Motion, p. 12.) Movants go on to state that Movants can  
4 only be obligated to defend or indemnify for the proportion of losses directly caused by them, and  
5 that Hovnanian must prove that by expert testimony. The specific defect issues as to the roofs and  
6 stucco, applicable standards of performance, existence of breach, repair opinions, and repair costs  
7 are all supported by expert testimony, even if most are contested. And the evidence including  
8 opinions, fact witness testimony, and contracts establishes who performed the work. Renco is  
9 obligated to defend and indemnify Hovnanian against claims for the work it performed on the  
10 roofs. And Desert Vista is obligated to defend and indemnify Hovnanian from the work it  
11 performed on the stucco.

12 **B. Breach of Contract or Warranty**

13 The record contains expert opinion evidence from Plaintiff which could establish that work  
14 performed by Movants violated the terms of Movants’ contracts. Plaintiff’s expert specifically  
15 cited to plans which were incorporated in the contract documents. Failure to perform the work  
16 under the contract pursuant to the plans and other incorporated and referenced standards  
17 constitutes a breach of contract. Exposure to claims and potential liability constitutes damage,  
18 although those damages may not be fixed until a judgment or settlement is entered. Although  
19 generally the same conditions may also support the more specific claims for contractual indemnity  
20 and defense, the claims for breach of contract and warranty have merit.

21 **C. Negligence and Contribution**

22 Plaintiff has withdrawn its Negligence claim and therefore Defendants’ claim for  
23 contribution is moot. Defendants agree that the remaining claims asserted by Plaintiff are all based  
24 on contractual or quasi-contractual theories and more appropriately pursued under contract-based  
25 theories of derivative recovery.

26 ///

28 ///

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1 **D. Movants have not satisfied any “Defense of KHov” or established that their**  
2 **insurers have discharged Movants’ contractual obligations.**

3 Movants have not introduced evidence supporting their claim that they have defended  
4 Hovnanian. Movants have not introduced any evidence to support or establish the nature and  
5 extent of any satisfaction of their contractual defense obligation. Movants have not cited any  
6 Arizona law for their assertion that their own obligation has been satisfied.

7 Movants were obligated per their contract to provide additional insured endorsements to  
8 Defendants. (SOF 60.) Desert Vista’s insurer has provided a defense through retention of the  
9 Lorber Greenfield & Polito, LLP firm as an additional insured on Desert Vista’s policy starting  
10 approximately August 24, 2021. Renco’s insurer wrote that it would provide a defense to  
11 Defendants as additional insureds on October 4, 2022 and stated it would defend through retention  
12 of the same firm. As quoted in the Motion, the parties’ contractual defense and indemnity  
13 provision requires the Subcontractors to provide a defense with legal counsel selected by the  
14 Contractor. Movants have not identified evidence that could establish that their insurers provided  
15 a complete defense. They cannot since the matter is still in progress and the defense cannot be  
16 complete. Nor have they provided any information to show that Movants’ contractual obligation  
17 for defense and for defense costs incurred since 2019 have been satisfied.

18 The Motion and the record are insufficient to support any ruling in Movants’ favor that any  
19 aspect of the contractual defense obligation has been supported.

20 Dated: November 7, 2022

LORBER, GREENFIELD & POLITO, LLP

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12 Clerk of the Court  
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15 Phoenix, AZ 85003

16 COPY of the foregoing emailed this  
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